



TEXAS A&M UNIVERSITY

School of Law

## TAMU Law Answers Webinars

### LATINX CIVIL RIGHTS Webinar Series

# “Latinx & Higher Education: Affirmative Action & the Commitment of Hispanic Serving Institutions”

Presented October 27, 2020

#### Panelists:

- David Hinojosa, Director of Educational Opportunities Project, Lawyers’ Committee for Civil Rights Under Law
- Loretta Martinez, General Counsel, University of New Mexico
- Gabriel Sandoval, Partner, Atkinson, Andelson, Loya, Ruud & Romo (moderator)
- Thomas Saenz, President and General Counsel of the Mexican American Legal Defense Educational Fund ([MALDEF](#))

*Disclaimer: While some of the panelists are attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.*

TRANSCRIPT of webinar video at <https://youtu.be/HVHRZosPxQw>

- Welcome to [Texas A&M School of Law](#)'s webinar co-sponsored with the [Network for Justice](#). It's a webinar on [Latinos and Higher Education, Affirmative Action, and the Commitment of Hispanic Serving Institutions](#). This is the fifth installment of our [Texas A&M Law Answers Webinars on Latinx Civil Rights](#). And we began our series with an introduction to the [Network for Justice](#), and then a discussion on the [census, reapportionment, and redistricting in the Latinx community](#). We've also had discussions on [Latinx economic opportunity in the age of COVID](#), and the last webinar discussed the [criminalization of Latinx immigrants in relationship to Black Lives Matter](#).

Today's conversation, we are focused on education, and we have a great group of individuals that have joined us. We have [David Hinojosa](#). He's a director of the Educational Opportunities Project for the Lawyers Committee for Civil Rights Under Law. [Loretta Martinez](#), who is General Counsel at the University of New Mexico, and we have [Thomas Saenz](#), who is President and General Counsel for the Mexican-American Legal Defense and Educational Fund. We also have as our moderator [Gabriel Sandoval](#), who is a partner at Atkinson, Andelson, Loya, Ruud and Romo, and he was gracious enough to help us organize this wonderful discussion.

So I'm going to hand it over to Gabriel for the rest of the conversation. I will say before we begin that while our panelists are lawyers, we will not be giving legal advice. This is really an opportunity to discuss the law generally, and so we hope that if you do have legal questions that pertain to any of the issues that are addressed here, that you consult with the Bar Association for a referral.

So after that, what we will do is also after the initial presentations we're going to have a question and answer period. And so if you have questions that come up during the course of the conversation, we ask that you please type it in the question and answer feature on the webinar. So that's the end of my presentation. And I'm going to hand it over to Gabriel Sandoval.

- Thank you so much, [Luz](#), and thank you [Network for Justice](#) and [Texas A&M University School of Law](#) for putting together an incredibly important panel to discuss an important issue facing all students in higher education, particularly to Latinos and persons of color, and that's the issue of affirmative action.

I am honored to be here with esteemed leaders in the fields of education as well as civil rights, Tom as well as David and Loretta, and I would like to start off with you, Loretta, and to give an overview of what is affirmative action, and what has been its history in the field of higher education, and its impact on Latinos, Latinas and other persons.

- Thank you Luz and Gabriel, and those are no small questions, but I will try to be brief. Simply put, affirmative action in higher ed involves two main areas, admissions and employment. And so on the employment side, that has to do with the recruitment and the hiring and retention of faculty and staff. That can be done in a variety of ways, everything from having search committees that are diverse, putting advertisements in places where people of color will see them, directly recruiting candidates, and developing programs like target of opportunity and grow your own programs, where you might have PhDs at your institution and you recruit them later to teach.

In college admissions today, and we'll go over this in a minute, how affirmative action happens today in admissions is that it's an extra of special consideration as part of the holistic review of an applicant's entire set of credentials. So you asked about the history, Gabriel, and the history of affirmative action in higher ed is over 50 years old. And I guess the one thing that I can say about it is that it's clear today that the courts and universities and the public still disagree after over 50 years about what the role of race should be in both admissions and employment programs in higher ed.

Affirmative action, the concept, and probably many of the law students on the call are studying this currently, started with a series of executive orders in the 60s, with first President Kennedy, then President Johnson, and then President Nixon. And you know, that was a long time ago, but higher ed by the late 1960s was already developing affirmative action programs in admissions, and by the early 1970s white students were already suing institutions for what was coined as reverse discrimination.

In some live examples today of the disagreement that still exists over affirmative action, so Tom's going to speak about this in a little bit, which is the vote next week, Prop 16, which is the vote to repeal the 1996 ban in California affirmative action. David is going to speak in a little bit about the case that's against Harvard right now that's working its way up the courts that challenges its longstanding affirmative action program. And finally, a lot of you have heard about President Trump's very recent and controversial executive order that's seeking to ban employee diversity training, not just in higher education, but with regard to any federal contractor or grantees.

I guess the last thing I would say about the history, Gabriel, and especially for the law students that are on the line, is not surprisingly the challenges since the early 70s to affirmative action in admissions have really targeted law schools and medical schools because of the limited number of individuals that can be admitted.

And so I point out to the students if they're interested in this history to take a look 1971, the University of Washington Law School case, where "reverse racism" was coined in this realm, the Bakke case in 1978 that had to do with the medical school of the University of California at Berkeley, and that was a case where there had been quotas, or set asides established, and it was made very clear by the Supreme Court that schools could use diversity and use affirmative action, but they couldn't do set asides or quotas.

In the 2000s, 2003, University of Michigan, Grutter and Gratz, those cases established where we really are today, that you could still consider race and the imperative diversity, but it had to be as part of a holistic review. And then finally in 2016, the Fisher cases that challenged the University of Texas' way of looking at diversity after they established the top 10% of the class rule, to get around bans on using race.

And in that case, the Supreme Court indicated that it was still legitimate to use affirmative action, but that it had to really be narrowly tailored, and that Supreme Court, which I think David and Thomas are going to talk about more in a little bit, which has changed with a new Justice as of yesterday, bottom line is they've already handed down a series of decisions to say you've got to narrow these programs. So it's something that we need to look forward, or look towards as we think about the last 50 years and the next 50 years.

- I wanted to highlight affirmative action continues to be challenged in different ways. Part of that is that there are misperceptions, misconceptions of what affirmative action is and what affirmative action is not. What are some of the most common misperceptions about affirmative action and its role in higher education?

- So when I was spending some time thinking about this seminar that we're doing, I had done a lot of work looking at history, and looking up some people over time who really helped promote affirmative action at some of our nation's elite institutions, for example. And there was a former associate Dean of Admissions at Harvard, whose name was David Evans, and he was quoted in 1975 as saying that there is this pervasive belief that affirmative action at Harvard means that, and I'll quote him, "Semi-illiterate Blacks are being accepted at the expense of white geniuses."

And he decried that misconception about affirmative action, and I would say that's one of the most pervasive beliefs, that there are quotas that are set aside, and the people who are benefiting from affirmative action are unqualified. I think another piece, Gabriel, is that there's this tension that's developed in our country about nondiscrimination on the one hand or affirmative action, which actually means doing something affirmative, right? Whether it's exercising a preference or what it may be, or an extra look at someone because of their race.

And that's really borne out by polling that's been done of the public, where the members of the public who've responded to Gallup polls have said that 60% of Americans say they favor affirmative action, whatever that means to them. But then when you get more specific and talk about college admissions and whether there should be a consideration of race, 70% of the public will say no, no, no. Wait a minute. Colleges should only consider merit. They shouldn't consider the student's race, and even if it results in less students of color.

So there's sort of this dissonance among the public about what it means in actuality. I know there's also within our own communities a concept that maybe only middle class Hispanics, Blacks, and others are really a beneficiary, and their children, versus--

- This idea is that these individuals do not need the assistance of affirmative action because they are already individuals who attended the prep schools and had the economic means to get other types of benefits of their class.

- Right, right. You know, the other, I guess, final piece I'd say on kind of the misperceptions and the dissonance is that for some they want what is called a 'race-blind society,' right? Race-blind admissions, race-blind employment procedures, and while that may be the ultimate goal, if there is a common perception that things are race blind, non-discriminatory, it's very hard to make the case that certain marginalized groups would benefit from some extra help, from a further look at their credentials, without then the opponents of affirmative action calling that reverse discrimination. Yes.

- Before we move on to David and talking about the challenges in the federal landscape, I want to just kind of focus, what was the purpose of affirmative action when it was first implemented, and what is its purpose now? Is it the same? Is it different?

- Yeah. Well, you know, the main purpose then and I would say now is to have more women. It's women too, not just people of color, but women and people of color be accepted into institutions and also to be hired and employed after they've obtained their education, because those individuals had been historically excluded.

So I would say that that rationale as to having affirmative action is still the case today. And kind of looking just for a little bit of research to share with the participants, just to give you an example of how things were, and probably most of you weren't born at the time that this was all happening, but a couple examples.

So in 1969, the Civil Rights Movement had really taken hold, affirmative action was now allowed through executive order, elite institutions were looked at in that year, and the data is that they had admitted twice as many Black students that one year as they had in previous years. Think about the fact that in 1976 white students made up 80% of all U.S. college students, and by 2016, so four years ago, that percentage of white students had dropped from 80% to 57%.

A lot of folks say that white women have been the biggest beneficiaries of affirmative action. And I think some of that is true. White women in higher ed in 1967 only made up 19% of all college students, and by 2009 they were 44%, and today, as we all know, women, white women and women of color, make up more than 50% of the student body.

Hispanic enrollment over about a 20 year period, 30 year period, doubled. And today we're 19% of all students in higher ed today. So I do believe that affirmative action has had a very beneficial effect on Latinos and other marginalized groups, and then when you couple that admissions, because that's the educational opportunity, with programs that enhance employment opportunity, it really results in a greater participation all across society.

- Thank you, Loretta. David, we're going to turn to you now. There have been several challenges to affirmative action programs in the last couple of decades. More recently, of course, with regard to Harvard's admissions program, and we just learned a week or so ago the Department of Justice filed a lawsuit against Yale University.

You've taken a leadership role, not only with regard to the matter with Harvard University, but in terms of your education, your field of profession, give us an overview. What's happening with the Harvard case? We know that there was an oral argument a couple of weeks ago before the First Circuit. What are some of the cases different from Harvard case, and what are they challenging? What are the issues that have been raised that are different, or maybe the same with regard to issues of affirmative action?

- Sure. So the Harvard case had been filed, I believe, in around 2015, and it was different than the Fisher case in one key respect, well, in a couple of key respects. One is that Harvard is a private university. It's not a public university, so it's not subject to the 14th Amendment, but it is subject to Title VI nondiscrimination law.

But secondly, this was the first lawsuit filed that included an intentional discrimination claim. So it wasn't just that Harvard's affirmative action program was illegal. They did bring those typical claims. But they also claimed that Asian-American students were being discriminated against vis-a-vis white students. That type of claim had not ever been filed, as far as I know, in all the cases dating back at least to Bakke.

And this changed the dynamic of it, because one was we don't want, as a civil rights organization. And we partnered in this case on behalf of student and alumni AMici with the Asian-Americans Advancing Justice and our pro bono partners of Arnold and Porter, but we never wanted to have a record that showed that Asian-Americans were being discriminated against, because if so then we would definitely have to change sides on that.

And so that was a real critical difference. There's other cases that have been filed against University of North Carolina. We represent, again, intervener students there. We're set to go to trial in two weeks minus one day from today. So if I'm a little spacey that might be because I'm prepping clients this afternoon as well. In that case, that was also filed several years ago and now it's reaching the trial stage.

There's another case against UT Austin. Lo and behold, we thought that we had already litigated that when I was at MALDEF with Tom in the Southwest office at MALDEF. We had definitely been involved in that case for several years, from the very beginning, from 2008 until it was finally decided in 2016. But they filed another case.

And all three of these cases have been filed by the Students for Fair Admissions. They're an organization that wasn't created organically, it was created purposefully by Ed Blum, who financed the Fisher lawsuit, who then went and got Abigail Fisher and her father to come on board as kind of officers of that new organization. They started recruiting primarily white and Asian-American people who were anti-affirmative action.

So they set out, just like they set out, Ed Blum had set out to destroy section five of the Voting Rights Act, so to he's had his eye on employment affirmative action as well, and in education. So all of these lawsuits have been filed by Students for Fair Admissions, and in each of these lawsuits not only are they saying, well your affirmative action program is illegal because it's one, you either don't meet the tenets of the compelling interest in the educational benefits that flow from diversity, or two, that your means that you're using, trying to achieve the benefits of diversity, are not narrowly tailored to achieve that.

But beyond that, what they are also suggesting is that race should be completely eliminated from the process. So it's not just as a consideration, but that it shouldn't even be included or referenced in applications that admissions officers can see. And if you can imagine yourself as being one of our students. For example, we've represented an Asian-American Vietnamese student who grew up and was ridiculed because of his accent, because of his inability to articulate himself, according to them, in the English language.

He taught himself to speak with a pencil in his mouth for over a year straight. He would just read and speak in the English language, trying to get rid of his accent and to be able to speak English more appropriately. And ultimately he overcame the bullying, became a valedictorian. Didn't have super high test scores either, but Harvard was able to look at that and see how race was an integral part of his own identity and his own talents, and what SFFA wants to do is completely eliminate that.

And then the fourth case, which you mentioned briefly, is the case that the Department of Justice has filed against Yale. And this is the first case that has been filed by the United States of America against a university, as far as I can recall. And that's incredibly troublesome, because this is the Civil Rights Division of our U.S. Department of Justice who should be seeking to ensure that pathways are not closed, and instead what they've done is go in and attack Yale, again, a private university.

And this case is very similar to the UT cases where they attacked, and the UNC cases where they attack the, quote unquote, traditional affirmative action program. But it's also dissimilar, because what they've done here is say look, Yale considers the race for several students. And again, nobody is getting bonus points on this. These are all highly qualified applicants. But it may consider race for underrepresented minorities that include Southeast Asians.

And the United States has said, wait a second, you're discriminating against East Asian-Americans in favor of Southeast Asians. And that's again quite remarkable that they would push that. But again, it's not so remarkable because they had even went beyond what SFFA was arguing in the First Circuit in the Harvard case last month and were chastised by the justices, by the panel, for trying to present an argument that even went beyond what SFFA was arguing. But that's the administration that we're dealing with today.

- For the individuals who are joining, particularly with emphasis of our law school students, can you give an overview of the Bakke decision, this idea that quotas no longer are permissible, never were permissible, and also what is the strict scrutiny application, and so that folks understand what are the programs that can withstand constitutional muster?

- Yeah, so in the Bakke decision that Loretta had briefly touched upon, the UC system at the medical school that was targeted in that lawsuit had essentially set aside certain seats for Mexican-Americans and African-Americans at the time. So white students and Asian-American students could not compete for those seats. And what the U.S. Supreme Court had come down and said, and there were several different opinions.

But when you look at Justice Powell's decision in the case, he said, wait a second, universities-- because you can't ordinarily use race. You just are forbidden from using race, ordinarily. Employment and education are two of the very few areas where the courts have allowed it, but in very narrow terms.

So with respect to universities they found that because of their unique status as these proving grounds for the future leaders in America, that they have a First Amendment right that must be balanced against the 14th Amendment's prohibition against race discrimination. They said, so if you're going to use race, then it has to be related to the educational benefits that flow from diversity. You can't just narrowly look at diversity. Either diversity has to be looked at across several different categories, so it's not just about race. But diversity-- could be around geography, it could be around income levels, several other facets.

And so the courts over the years, and starting with the Grutter and Gratz decisions had deemed that to be the controlling opinion. And so when you talk about strict scrutiny, because race is

used in these circumstances, you know, by universities, they one, have to have a compelling interest. The compelling interest has to be set within the mission and goals of the university. It has to be measurable as well. So it can't just be something lofty that you just want to pursue. So there's a little science behind that.

And then secondly, the means that you're using to seek that have to be narrowly tailored to achieve those. So there are certain guideposts oftentimes that the courts will look at. Whether or not you're affording bonus points for students because of their race, which is not in any of the four cases that I've mentioned here. Whether race-neutral alternatives, or what we call race-blind, because they really are race-blind alternatives, whether or not those are available and practical for the universities to engage in.

So for example, UT Austin had used the top 10% to help diversify its student population. But should UT be forced to use the top 10% for all of its student population? The Court in Fisher said no, it shouldn't. But you have to exhaust those race-neutral alternatives that can be implemented.

And then you can't have any quotas. So there was a suggestion that Harvard had used quotas because its African-American population had changed only by 1% or 2%, but you have a very small percentage of African-Americans applying to Harvard in the first place. And so you can't expect large fluctuations. And they did dig deeper into it to make sure they weren't racial balancing for its own sake of using race.

And then race can't be the deciding factor either. And when you look at again, these remarkable students that we represent, I mean their talents go from extracurricular activities, commitments in the community, to grades, taking the toughest classes, so we know how inequitable K12 education is, but are they taking the toughest classes that they have available to them? And it's things beyond the standard SAT and ACT test scores that typically SFFA and the U.S. Department of Justice are trying to suggest.

Well, when we look at test scores and we see lower averages for African-Americans and Hispanics than whites and Asians, well then they must be discriminated against, as though that's one, as though it's a valid factor, because research would suggest otherwise, but two, as though that's the ultimate merit premium that we should be recognizing, and it's absolutely not. These are incredibly well-rounded students.

- We'll talk about that more with regard to other barriers with regard to admissions to post-secondary institutions. Before we move on to Tom Saenz, we now have a new associate justice in the Supreme Court, Justice Coney Barrett. How does your view change now that she will be sitting on the Court, the highest court in the land. What do we know about her previous decisions on issues of affirmative action? David, go ahead.

- Yeah, so I know more generally about Justice Barrett's record on civil rights, and the Lawyers' Committee has a report on this that our policy team had generated, and our president and executive director Kristen Clark had actually testified before the Senate on her qualifications, or her questionable qualifications, especially given her civil rights history. And it's dismal. It's dismal. It's abysmal. It's horrid. And it is troubling.



She comes from some of the same mindsets that some of the other more conservative justices have articulated using originalist theory as though the Constitution is not intended to be a living document. And those types of arguments can be very troubling in these types of cases. I think before we were discussing, well, if Harvard goes past the First Circuit, we're fully confident that we're going to prevail at the First Circuit level, because we have strong precedent.

But that precedent can change. That precedent could be under-ruled. It could be so much that they throw out Harvard's affirmative action case and under-rule without overruling the prior precedent and making it so troubling that universities won't want to engage in affirmative action because they have no idea exactly what they need to do.

- That would truly [? defend. ?]

- Yeah, absolutely. Or they could end up throwing it out altogether. And there's been some dissenting opinions in the past from Justice Thomas for example, that suggested perhaps that's where they needed to go. Can Thomas convince Alito, Barrett, and Kavanaugh to go that route? I don't think that Gorsuch and Roberts will bite. Roberts already signed on to the Fisher opinion, the Fisher One opinion, that suggested that they send it back and not necessarily throw affirmative action out, again, in the Fisher One case decision.

So we have some confidences on that, but again, the most terrible thing could be where you have a split decision where you have some justices saying throw it out, others who hold that yes, you can still have diversity as a compelling interest. But this doesn't meet that standard, because Harvard's plan has been among the gold standards in these cases, and many of the other universities have modeled their affirmative action plans off of Harvard's.

- Thank you, David.

- For the last 50 plus years.

- Tom, why don't you focus what's happening in California? A week from today, Californians will vote on Proposition 16, which seeks to repeal Proposition 209, which forbade the use of race, gender, or national origin in the use of public contracting, higher education, as well as public contracting. Tells us a little bit about Proposition 209, its genesis, and what Proposition 16 seeks to accomplish in this regard.

- So to begin, we're already voting on this. Actually today, more than a third of Californians--

- Good reminder, go out and vote.

- Have already voted. And we think by our polling that those who have already voted are in support of Proposition 16, but there are still two thirds who have not yet voted, so we have a lot of work to do. Proposition 16, as you mentioned, would repeal the measure that Loretta talked about, passed in 1996, Proposition 209, which was a part of these ongoing efforts to challenge affirmative action.

Although it prohibited affirmative action in public education, public employment, and public contracting, the clear focus was higher education. The main proponent of Proposition 209 was someone appointed to the UC University of California Board of Regents, Ward Connerly, appointed by Governor Pete Wilson. It was both an assault on, a part of the nationwide assault, in the name of reverse discrimination, quote unquote, to challenge affirmative action everywhere. But it was also exploited by Pete Wilson, just as he had done two years earlier with Proposition 187, targeting the Latino community through its immigrant members.

It was-- Prop 209 was a racially divisive wedge issue, the kind that Pete Wilson was known for. And in fact, when it was passed by 55% of the total California vote, the exit polling tells us that super majorities of all voters of color opposed Proposition 209. So the LA Times exit poll says 76% of Latino voters voted no. 74% of African-Americans voted no. 61% of Asian-Americans voted no. But because of the composition of the electorate in November 1996, it still passed with 55% of the vote.

It was clearly designed to appeal primarily to white men, and it did that. And that's important to note because it's true today, that these efforts by the Trump administration are designed to appeal to white men, his major voting constituency, to try to inspire them to come out and vote for him. I don't think the timing of the Yale case in particular is coincidental. I don't think the timing of the executive order that Loretta mentioned about training is coincidental.

- These both go away if there is a change in administration, in your view? Obviously the executive order?

- I do think the executive order goes away. Whether the Department of Justice will reconsider the Yale filing, I think that's also distinctly possible. I think there are serious questions, as David suggested, with this administration's approach to these issues. But Proposition 16 is on the ballot in California to repeal Proposition 209.

The problem is that it's been 24 years, almost a quarter century, since there's been any affirmative action in California. And that means that many voters were not alive, or certainly were not politically aware, in 1996. So they may not have the level of understanding of what affirmative action is, of what Proposition 209 was, and because it is a repeal we inherit the language used by the opponents, and it's a little bit misleading.

They add to that misleading wording of Prop 209 itself by their own rhetoric that feeds into some of the sort of canards that both David and Loretta have already talked about. They use the word--

- It's called the California Civil Rights Initiative.

- They use the word quota as often as they can, even though as David has explained, quotas and set asides have been unlawful nationwide since Bakke in 1978, so for 42 years. But they use the word quota and try to convince people that Prop 16 will lead to quotas and set asides once more, and along the lines of what I think Loretta had mentioned, they tried to suggest that this is a matter of qualified versus unqualified applicants, instead of recognizing that selective institutions

like the University of California actually have far more qualified applicants than they can accommodate. There just aren't enough seats.

So it's not about choosing anyone who's unqualified. It's about how you select among the many who are very, very well qualified. There just aren't enough seats for them. And affirmative action is simply an ability to take into account people's experiences as racial minorities or women, and how that might have affected their credentials, quote unquote, as typically used in selective admissions system.

Underlying all of this, underlying affirmative action, underlying the assault on affirmative action, is a debate about the selection criteria that we use. But the fact is that almost all selective universities continue to use standardized tests for example, that have a demonstrable discriminatory effect on African-American and Latino students, and they have little or no correlation with success in universities, much less in career or lifetime. So if you were to look at whether these are good measures of merit, quote unquote, and if we were to do that with a clear and unbiased eye, I think most people would say no, standardized tests are not a good measure of merit.

But because we weigh them so heavily and use them in making selective admissions decisions, we end up with discriminatory outcomes that reflect the discriminatory effects of those standardized tests, which although there has been work to improve them, still show exactly what I've described, discriminatory outcomes for Black and Latino students, and little or no correlation with success in a university setting, much less success post university in career.

- So there is some correlation?

- The bottom line of all of this is that we still see, in California, significant disparities. This is important, particularly for the Latino community, because the growth of the Latino community means that in absolute terms our numbers are up. They would have to be since 1996, because the growth of the population would necessarily have led to increases in students going to the University of California. Indeed, just this year, as you know, Gabriel, we had headlines that said, for the first time ever Latino students were the largest group admitted to the University of California.

But the truth of the matter is we probably should have passed that milestone a decade or more ago, if the numbers in high school were any indicator. So you really have to compare what is the pool you're drawing from and who's being admitted to these universities. So the numbers right now for the University of California are as follows. 54% of all 12th graders in California public schools today are Latino. So 54% of high school seniors on the cusp of going to higher education are Latino.

And yet if you look at all undergraduates at the University of California system wide. We are not only talking about Berkeley and LA. We're now talking about the entire University of California system, which is selective, but obviously Berkeley, UCLA, much more selective. If you look at system wide, Latinos are only 25% of undergraduates at the University of California. So 54%

versus 25%, is a 29 point gap. There's really not a good explanation for that kind of disparity to continue to exist.

So Prop 16 is there to address two issues. One, to eliminate that racially divisive measure from the mid 90s that was enacted over the vehement opposition of voters of color, and number two, to begin to allow the state to be more aggressive in addressing the racial disparities epitomized by the numbers I just provided, but that really exist when you talk not just about higher education, but about employment in public arena and public contracting.

And in California without having affirmative action available, we see huge disparities. And more problematic, we see policymakers who won't address those disparities, even to look at race neutral, gender neutral options. As David explained, the US Supreme Court now says before anybody implements an affirmative action program, they've got to look at what are the race neutral approaches that might help you to address those disparities that you're trying to eliminate? What are the gender neutral approaches that might assist in doing that?

In California we don't have those discussions. Why? Because no policymaker, whether it's a UC regent or an elected official, whether you're elected or appointed, no policymaker wants to highlight an issue like racial disparities if in the end they feel they're powerless to address them. Identifying an issue and then saying I can't do anything about it is a surefire way to get your re-election challenged by folks, to get your reappointment challenged by folks.

So policymakers, because of Proposition 209 in California, don't have any incentive to even look at race neutral, gender neutral approaches to these disparities. So Proposition 16 will catalyze those discussions in a year when we've seen in our headlines not just in California, but nationwide, those racial disparities writ large.

Whether that's in the pandemic itself, where Blacks and Latinos have higher rates of infection and higher rates of death from infection. Whether it's in the recession that the pandemic catalyzed, where we see greater levels of income loss and unemployment among Latinos and Blacks. Whether it's in the reinvigorated movement of Black Lives Matter in the aftermath of the police murder of George Floyd, where we have greater cognizance and awareness of the ongoing racial disparities in our law enforcement systems.

So we see all these disparities. Prop 16 provides an opportunity to begin to address them. But before I conclude, I want to cite one more important consideration for Latinos when it comes to affirmative action in higher education. We have a real problem in that diversity is the only currently recognized compelling government interest that higher education institutions can use to implement affirmative action.

- Why is that a problem?

- It's a problem for us because of our numbers. So we are now, as you know, 40% of the population of the two most populous states in the country, California and Texas. When you look at younger folks, school age folks, we're an even higher percentage of both of those states. And when you reach those numbers, it's easy for the opponents of affirmative action to say, hey, they

already have critical mass. You can't engage in affirmative action for Latinos, because they already have 25% of the undergraduate population at UT Austin or at one of the UC campuses. And the argument is that that's sufficient diversity for any purpose. And so you do not have a compelling government interest to engage in affirmative action that would benefit the Latino community.

It's no accident that folks like Ed Blum targeted UT in the Fisher case. It's no accident that there is, again, as David has indicated, another UT case. They go after those institutions because of that argument about the Latino population. They don't come after California because of Prop 209. If we succeed and get Prop 16 in place, maybe Ed Blum will start spending his money challenging programs in California, University of California, California State University.

But that is an ongoing problem. And that's a problem, particularly when you have a Supreme Court that has changed in the ways David has described. I mean, we can expect that one or more of these justices will take up that notion that Latinos have enough representation, even when it is only half of what our representation is among high school students. Both Texas and California, we're well above 50% of high schoolers. So saying you have 25% and that's enough still means that you're cutting in half, cutting in half Latino representation in higher education.

- Thank you, Tom. We have about 15 minutes left. Loretta, I want to turn to you and also ask other panelists similar questions, what are other barriers to access to higher education for Latinos and persons of color? Loretta, you mentioned a little bit when you spoke about the overview of affirmative action, that there is an important need to have diversity in faculty and administrators. You've served in several leadership positions, currently with University of New Mexico, also in Colorado and Harvard. Can you flesh that point out a little bit more for our audience?

- Sure. And you know, Gabriel, as we are still in the midst of the pandemic, just a couple of things that shouldn't be overlooked are that affordability of higher ed is a huge barrier, but also now access to technology, and whether that's having a computer and having adequate Wi-Fi as well, doing online classes, those are huge barriers that of course affect communities of color, and important things, more than other communities.

But unfortunately Latino representation, particularly like at some of the highest levels of higher ed, like the president, has remained stagnant over the past couple of decades, and in some cases, as the economy gets worse, as we go into recession, it even gets worse for a variety of reasons. But just to give you one example, 19% of the students in higher ed today around the country are Hispanic. 4% of presidents of institutions, whether they're Hispanic serving institutions, or non-HSIs, are presidents. So there's still this huge gap in the leadership ranks in higher ed today.

- David, I wanted to turn to you. Tom mentioned it, and it's an important argument that is being made, that the standardized tests are often employed by most undergrad institutions are not good indicators of success. And that has an adverse impact on persons of color, primarily Latinos, Latinas, and African-Americans. Can you speak to the use of standardized tests?

- Yeah, absolutely. You know, what's interesting, beyond its disparate impact on students of color, primarily Native American, Black students, and Latinx students, and even certain

Southeast Asian groups, even beyond that, if you look at the roots of how the SAT was developed--

- Sure, tell us.

- It was developed by eugenicists. Someone who was looking at it a little differently trying to isolate certain European groups, your Nordic Europeans versus southern Europeans, but over the years it was then utilized by colleges to try and exclude certain populations. So at the same time that you saw some in the UC system, about how they adopted this, and this is part of a lawsuit that was brought by public counsel challenging the SAT both for admissions purposes and for scholarships in the UC system.

But they adopted the SAT and started using it as an exclusionary tool. So like what Tom mentioned, as certain colleges, more highly selective colleges in the UC system had more people of color accessing those after the *Brown v. Board* and the *Sweatt v. Painter* decisions had come down trying to break down some of these systemic barriers, they started creating their own barriers. And by using standardized tests, that again, had no real predictable value on your success in college.

And so through the years it's just become a matter of fact. Whenever you talk about, oh, well are you qualified to go to that college? What sort of SAT scores did you get? What sort of ACT scores did you get? People just kind of think of these things matter of factly, but they don't understand how it is rooted in a very discriminatory manner, how there isn't any predictive value when it comes to their success outside of possibly first year grades in college, but not college completion, not second year grades, et cetera.

So with little value beyond that, it's just incredible about how, again, we've come to this point that COVID now has opened people's eyes. So not all students can access the test. The SAT has closed certain places because of COVID concerns. Students aren't able to prepare for it. So many universities have gone test optional. But test optional means it's test optional for some, but not for others. So those who are performing high are still going to be taking the test. They're still going to be able to afford the test, which is another problem, is that you can manufacture your test score through highly paid tutors and tutoring programs too, that other students don't have access to.

So it's so problematic in so many ways. And the fact is that most universities, including most of the highly selective universities outside of Florida, have gone test optional. So I will say that we are hopeful that this may perhaps help pave the way for universities to see the other options and to see the whole value of students in their qualifications and talents when applying not just for admissions but also for scholarships.

- Thank you, David. Tom, I want to focus a little bit on another argument that has been raised by those who oppose affirmative action, and the argument goes like this. Affirmative action tries to address the inequities and failings at the K through 12 level, and if anything we should invest in K through 12, and not necessarily move forward with continuation with affirmative action

programs. How do you respond to that, that affirmative action really is trying to address inequities in K through 12 public education?

- It's not an either or proposition. We should be addressing both inequities in K through 12 and the inequities that in here in our selection systems for higher education then that have even greater effects in universities, so we see the pipeline narrow even more for underrepresented groups in graduate school, for example.

So I mentioned that Latinos are 25% of the undergraduate student body at the University of California. They are about 10% of the graduate student body at the University of California. So we need to address the sources of these disparities, the contributors to these disparities at every possible point in the pipeline. It starts even before K through 12.

But it's important to note, for example, with respect to California and Prop 209 that I mentioned, Prop 209 also prohibited doing anything race conscious or gender conscious in K through 12 education, because it does apply to public education across the board. So even if school districts wanted to have a STEM program only for girls, they could not do that in California under Prop 209.

You could not have a program to retain teachers of color, if a district recognizes that it has a particular problem retaining teachers of color, we all know that there is a problem retaining teachers after third or fifth year in any event. But if you want to make sure you're keeping your small number of teachers of color, so you want to put a retention program that focuses on them, you can't do that in California.

So it really is a measure that has hobbled us across the board in the education system. But the other response to your question is simply that you are judging the K12 system based on criteria that themselves may be biased if you are looking at who's getting into higher education. Right?

When we talk about these issues we have to begin to question the whole structure of selection criteria. David and I both talked about the use of standardized tests. But you add to that, David talked about the fact that there is differential access, how real that access is to the kinds of courses that get you an enhanced GPA. Do you do you really have access to honors, AP, IB courses in as many subjects as someone else? And if you don't that's going to impact what your maximum weighted GPA is versus that other person.

But we also use, regularly in selective systems, teacher recommendations. But we now recognize, part because of the Black Lives Matter movement, that there are subconscious biases that in fact actions of cops, well they also affect teachers. Teachers in their minds have stereotypes that are negative about Blacks and Latinos. They are not negative, in fact, positive for certain other groups. And why would we assume that that subconscious bias doesn't affect teacher recommendations in the same way we see it affecting how cops deal with people in the streets?

You also look at grades. Grades are also highly subjective. You have teachers who are making decisions, and for some of those teachers, they are informed, even if they don't know it, by their

own deeply held but perhaps not openly acknowledged stereotypes in their heads about certain students. And we've talked about basically all of the components of selective admissions decisions.

So the truth is we have to look very carefully at all of these issues, and we have to question whether the systems that we inherited, including the very dubious discriminatory origins of the use of standardized tests that David has described, we have to question whether these systems that have been in place for decades are really ones that can be defended as merit based or meritocracies, because they're not.

Part of the reason we have to question it is one of the major issues about affirmative action, entirely created by the opponents of affirmative action and their characterization of it, is stigma. Stigma is real for many students, and many students fear it. And we have to do what we can to eliminate it. You know what I mean by stigma. It's when someone says to you you're not as well qualified because you got in on affirmative action. That's a real concern. And it's something that has to be a part of this debate.

- Thank you Tom. Loretta, I want to ensure you identify the role that Hispanic serving institutions have played in a more broad discussion about Latino access and completion of post secondary educational institutions. You currently serve as chief legal counsel at the University of New Mexico. Can you describe the role that HSIs play for Latinos and Latinas across the country?

- Sure, I'd love to. And by the way, I've spent 20 years of my legal career as a higher ed general counsel. Over half of that has been with HSIs, because that's where my heart is. Metropolitan State University of Denver, the City University of New York, and now UNM. And the reason why I love these institutions is because of how much impact they have. So 66%, two thirds of all Hispanic students in the country are at HSIs, and HSIs are defined as institutions that have 25% or more of their student population as being Hispanic.

And one of the reasons why HSIs has been really wonderful for the Hispanic community is most of these institutions are public, which means that in general they're much more affordable than private institutions, and when you look at the statistics of the top 25 institutions, whether they're HSIs or not, that are graduating Latinos and Latinas, you'll see that for undergraduate about 75% of the top 25 institutions are HSIs. So that's a very big impact.

But as Tom mentioned, equally important is graduate students. And so of the top 25 institutions that have Hispanics in graduate, well, master's programs, over half of them are HSIs, and with regard to PhD programs, over a third of them are HSIs. So HSIs really provide this major pipeline to educational opportunity for Hispanics in the U.S. And they're a very big force, and as our population grows, so do the number of HSIs. There are about 540 HSIs now in the United States and Puerto Rico. So it's a very large and growing percentage of the educational opportunities that we have available in the United States.

- Thank you, Loretta, and I would like to thank all of the panelists today. Unfortunately, we have come to an end, but I want to thank each and every one of you who are leaders in the field of



education and civil rights. And we also have the connection, we're all connected to [MALDEF, the Mexican-American Legal Defense and Educational Fund](#). Some served on boards, I used to work there back in the day, and also David Hinojosa. So thank you Tom, for your leadership. Thank you David, for your leadership, and Loretta, your leadership. Of course, [Luz Herrera](#), thank you for this opportunity to moderate this panel, so take it away, Luz.

- Yeah, thank you Gabriel and all the panelists for a great conversation. I recognize some of the individuals who chimed in, some are definitely law students, but we also have other education professionals that have logged in, I think to learn a lot about what you have to say. So thank you so much.

I did want to, in addition to thanking everyone, invite those of you who are here to let others know we have our last webinar on November the 10th, and that one will look at what's in store for [the Latinx community after the 2020 election and beyond](#). So it'll be a great conversation. We have Professor Lisa García Bedolla from University of California Berkeley who will be joining us. Secretary Julián Castro, María Teresa Kumar from Voto Latino, Tom Saenz will join us again, and it will be moderated by Professor Rachel Moran. So we hope to see you then. Thank you everyone.

- Thank you so much. Bye bye.

- Bye.